Supreme Court, U.S.
FILED
JAN 30 1998
CLERK

No. 97-949

In The

Supreme Court of the United States

October Term, 1997

ANN L. GILL,

Petitioner,

vs.

SYSTEM PLANNING CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Ann L. Gill claims that she was retaliated against and constructively discharged in violation of Title VII of the Civil Rights Act. 42 U.S.C. § 2000e, *et seq.* These claims allegedly arise out of Ms. Gill's August 1994 resignation of employment with System Planning Corporation[1] ("SPC") following a transfer to a new job with no loss of grade, pay or benefits. Although the facts of this case should not prove particularly important to the determination of whether to grant the Petition for Writ of Certiorari, the misleading and unsubstantiated version of events set forth in the Petition must be corrected.

SPC conducts research and development activities for the federal government, primarily as a defense contractor.[2] Ms. Gill was employed in SPC's Security and Information Systems Department (SISD) from 1984 until she was transferred in August 1994. As a Security Assistant, Ms. Gill performed mostly clerical and administrative functions that could be performed by computers by 1994. Because of intense competition and severe cutbacks in federal defense spending, SPC determined it was necessary to reduce costs and make more efficient use of technology. As one element of its effort to become more

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[1] System Planning Corporation does not have a parent company or any nonwholly owned subsidiaries. *See* Supreme Court Rule 29.6.

[2] The facts in the text of this Brief in Opposition are described by the Fourth Circuit in its opinion below, Appendix A to Petition for Writ of Certiorari ("Petition") at pp. 2a-5a.

competitive, SPC reduced its workforce by fifty percent (50%) between 1991 and 1994.

SPC reduced its workforce systematically, focusing its efforts on SISD beginning in January 1994. SPC wanted to reduce SISD by half and improve its efficiency and performance. As part of this process, SPC hired Dorsey Clement, an outside consultant and former SPC employee, to evaluate the structure and operation of SISD. After concluding her review, Ms. Clement determined that SISD should be reorganized to consist of three positions: a facilities security officer (FSO); an information systems security officer; and a document control specialist. This reorganization would reduce the number of positions in SISD from six to three. As early as April 1994, all SISD employees, including Ms. Gill, knew that three positions would be eliminated from SISD.

In May 1994, Ms. Gill applied for and did not get the FSO position, which would have been a promotion. The position went instead to Phyllis Moon, who was Ms. Gill's supervisor. Unlike Ms. Gill, Ms. Moon already held a management position with SPC and had significant experience with Automated Information Systems (AIS), an area in which SISD needed help. Ms. Gill, who is white, publicly protested the selection of Ms. Moon as FSO, insisting that she was not qualified and that she had been selected only because she is black. Ms. Gill shared her opinion with anyone who would listen, including Ms. Moon. Ms. Gill refused any attempt to use internal grievance procedures and immediately announced that she would file a charge of racial discrimination.

In July 1994, SPC was ready to implement the remainder of Ms. Clement's recommendations, which still required the elimination of three positions. Not surprisingly, two positions were vacated while the reorganization decision was pending. SPC decided that employees who vacated these positions would not be replaced. It was necessary, however, to displace Ms. Gill to eliminate a third position. The three employees who remained in SISD were significantly more qualified than Ms. Gill. SPC still had three employees in SISD when this case went to trial.

At the same time other employees were being laid off, SPC decided to find Ms. Gill another job within its organization rather than terminate her employment. Linda Easley, SPC's Director of Administration, met with Ms. Gill to discuss this possibility. Ms. Easley offered Ms. Gill several alternatives, including jobs as: (1) a Personal Assistant; (2) a Security Assistant; and (3) a Facilities Assistant. Ms. Gill was not interested in being a Personal Assistant unless absolutely necessary. She also rejected the security position, which was the only available job that would have allowed her to remain in the security field, because of "continual catfighting" among the employees with whom she would have to work.

The only job in which Ms. Gill indicated a willingness to work was Facilities Assistant. This job included supervisory responsibility, which Ms. Gill did not have in the SISD. Ms. Easley made it clear that Ms. Gill would not lose any grade, pay, or benefits by virtue of the transfer to the new full-time position. In addition to overall responsibility for the telephone system and dealing with outside vendors, Ms. Gill was to be responsible for managing the

plan to relocate a large number of SPC employees. Ms. Easley had previously assured Ms. Gill that SPC would support any additional training or education she was willing to assume.

Ms. Gill returned from two weeks of sick leave and never gave the facilities job a chance. The same day she reported to her new position, Ms. Gill started circulating her resumé looking for other employment. On August 2, 1994, her fifth day as a Facilities Assistant, Ms. Gill received a job offer to be an Assistant FSO from Areté Engineering Technology Corporation ("AETC"). The job paid $4,000 less than Ms. Gill was making at SPC, but it was consistent with her aspirations in the security field. Ms. Gill asked AETC to put the job offer in writing.

Ms. Gill did not tell anyone at SPC that she was unhappy as a Facilities Assistant, nor did she tell anyone that she was looking for another job. During Ms. Gill's short stay in facilities, Ms. Easley continued to ask Ms. Gill if she was interested in returning to a security-related position. Ms. Easley also asked Ms. Gill whether she was still interested in being involved with the Local Area Network (LAN) Mentoring Program. Ms. Gill, who by this time had another job offer in hand, responded that she did not know what she wanted.

On August 3, 1994, Ms. Gill's sixth day as a Facilities Assistant, she noticed that her name had been omitted from a draft memo detailing organizational changes. Notwithstanding the fact that Ms. Easley was still making changes and trying to determine whether Ms. Gill wanted to return to a security position, Ms. Gill considered this omission the "final cumulative blow." The other "blows"

presumably were that she did not like her new job duties, and she had not been informed of a department meeting that was announced while she was out on sick leave. When Ms. Gill returned home from work that day, she accepted AETC's written job offer.

Ms. Gill filed a lawsuit alleging causes of action including discriminatory failure to promote and retaliation against SPC. A trial was held and the jury returned a mixed verdict. The jury found for SPC on the promotion claim and for Ms. Gill on her claims of retaliation and constructive discharge. The jury awarded $80,000 in compensatory damages. SPC moved for judgment as a matter of law or, in the alternative, for a new trial. The trial court summarily denied SPC's motion and entered judgment on the jury verdict. The trial court later awarded costs and attorneys' fees totaling $61,459.14.

The Court of Appeals for the Fourth Circuit reversed the trial court, holding that the trial court should have granted SPC's motion for judgment as a matter of law on Ms. Gill's claims of retaliation and constructive discharge. In both cases, the Fourth Circuit held that Ms. Gill had failed to present sufficient evidence to support the jury's verdict.

REASONS FOR DENYING THE WRIT

The Petition misrepresents the legal standards applied by the Court of Appeals in a desperate attempt to manufacture a question that merits this Court's attention. The Court of Appeals did not require Ms. Gill to prove

"pretext plus," and it did not apply a "no choice" standard for constructive discharge. The Fourth Circuit's decision on each claim resulted from the proper application of a well-settled legal standard. Ms. Gill is asking this Court to reexamine the factual record in this case, something which is not important to anyone other than SPC and Ms. Gill.

Although the Petition exclaims that the right to a jury trial in civil rights cases is in serious jeopardy in the Fourth Circuit, one need look no further than that court's most recent decisions to dispel such an alarmist claim. For example, in *Harris v. L&L Wings, Inc.*, ___ F.3d ___, 1997 WL 786926 (4th Cir. (S.C.)), decided December 24, 1997, the Fourth Circuit affirmed a jury verdict awarding compensatory and $150,000 punitive damages to each of two sexual harassment plaintiffs. Clearly, the Fourth Circuit does not hesitate to uphold jury verdicts properly supported by the evidence.[3]

A. The Petition Misrepresents The Standard For Intentional Retaliation Applied By The Court of Appeals.

The Court of Appeals did not require Gill to show "pretext plus" to support her retaliation claim. The

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[3] The petitioner also finds fault with the fact that the Court of Appeals disturbed a verdict that "had been reviewed and confirmed by on the most experienced federal trial judges in the country." (Petition at p. 5). Ironically, Petitioner then refers this Court to the Petition for Writ of Certiorari filed in *Grier v. Titan Corp.* filed concurrently with the Petition, which in part attacks a decision by the same federal trial judge.

decision was a straightforward application of the shifting burden of proof scheme developed starting with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and most recently explained by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The Court of Appeals did not have to address any of the finer points raised in *Hicks*, because Ms. Gill failed to create a genuine dispute of material fact concerning the reason she was transferred to facilities. This cannot be a "pretext plus" case, because there was not even any evidence of pretext.

The analysis is not difficult. Ms. Gill was required to establish a *prima facie* case of retaliation, which shifted the burden to SPC to articulate a legitimate nondiscriminatory reason for its actions. The final part of the test, according to the Court of Appeals, was that "[t]he plaintiff must persuade the factfinder that the asserted reason for the adverse employment action is a mere pretext and that the true reason for the action was retaliation." (Appendix A to Petition at p. 7a). This is not inconsistent with *Hicks* or with any decision of another Federal Appellate Court interpreting or applying *Hicks*.

A plaintiff always bears the ultimate burden of persuading the factfinder that the reason for an adverse employment action is a mere pretext and that the real reason was retaliation. This, however, does not create a "pretext plus" standard. It is the articulation of this Court's decision in *Hicks* that proof of the elements of a *prima facie* case, along with disbelief of the employer's reasons, does not entitle the plaintiff to judgment as a matter of law. The phrase "and that the real reason was retaliation," recognizes the possibility that a jury will

disbelieve an employer's reasons but find that the real reason was not discrimination.

The authority cited in the Petition relies upon proof of a *prima facie* case *and* disbelief of the defendant's reasons. Accordingly, there must be evidence from which a jury could disbelieve the defendant. Otherwise, every plaintiff who could establish a *prima facie* case would be entitled to a jury trial. Nothing in *Hicks* or any of the cases cited in the Petition creates such a right.

The Court of Appeals assumed, without deciding, that Ms. Gill had established a *prima facie* case of retaliation.[4] Ms. Gill's case then fell apart. The Court of Appeals reviewed the record to determine whether there was substantial evidence to support a disbelief of SPC's reasons for transferring Ms. Gill. The Court of Appeals concluded that Ms. Gill had failed to present evidence from which a reasonable jury could disbelieve SPC's reason for transferring her to the facilities job.

SPC explained that Gill was transferred to facilities because her duties, which were primarily clerical and administrative, could be performed by a computer. The Court of Appeals wrote:

> Our review of the record reveals no evidence to refute this explanation for the decision to transfer Gill to another department. Accordingly, substantial evidence does not exist to support a

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[4] The Court of Appeals noted that "the validity of this assumption is by no means clear." (Appendix A to Petition at p. 7a).

> determination that SPC's asserted reason for Gill's transfer was mere pretext for retaliation.

(Appendix A to Petition at p. 7a).

The Court of Appeals did not apply a "pretext plus" standard because Ms. Gill's case failed much earlier in the process, when she failed to create a genuine dispute of material fact concerning the reason she was transferred to facilities.

B. The Petition Misrepresents The Standard For Constructive Discharge Applied By The Court of Appeals.

The Court of Appeals did not require Ms. Gill to show that she had literally "no choice" but to resign. The petitioner states that the appellate and trial courts in this case relied upon *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996). This is also false. Neither court relied on *Blistein*. It is clear that the phrase "no choice," which the petitioner has incorrectly seized upon, was not meant to establish a literal standard. It is a vernacular iteration of the proper legal standard.[5]

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[5] See *Blistein*, 74 F.3d at 1468 (where the court writes, "intolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign – that is whether he would have no choice but to resign.") (citation omitted).

The Court of Appeals required Ms. Gill to prove that her working conditions were so intolerable that a reasonable person would have felt compelled to resign.[6] (Appendix A to Petition at p. 8a). This is the same standard applied by every other Federal Appellate Court. *See Aviles-Martinez v. Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (whether " 'working conditions would have been so difficult or unpleasant that a reasonable person in employee's shoes would have felt compelled to resign' ") (citation omitted); *Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 361 (2d Cir. 1993) (whether employer deliberately created working conditions " 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' ") (citation omitted); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (whether the "conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign"); *McCann v. Litton Sys., Inc.*, 986 F.2d 946, 951 (5th Cir. 1993) (whether working conditions become so difficult or unpleasant that a reasonable person in employee's shoes would be compelled to resign); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991) (whether " 'employment options would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' ") (citation omitted); *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993) (whether employer made working conditions so intolerable that

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[6] The Petition does not address the part of the constructive discharge standard dealing with an employer's intent.

employee was forced to resign); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1217 (8th Cir. 1986) (employee required to show "working conditions that a reasonable person would find intolerable"); *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990) (whether a reasonable person in plaintiff's position would have felt forced to quit); *Acrey v. American Sheep Indus. Ass'n*, 981 F.2d 1569, 1573-74 (10th Cir. 1992) (whether employer's actions "would compel a reasonable person to resign"); *Wilson v. S&L Acquisition Co.*, 940 F.2d 1429, 1436 (11th Cir. 1991) (did plaintiff show that her "working conditions were so unpleasant that a reasonable person would have felt compelled to resign?"); *Katradis v. Dav-El*, 846 F.2d 1482, 1485 (D.C. Cir. 1988) (whether working conditions "would drive a reasonable person to resign") (citation omitted).

The Court of Appeals applied the well-settled legal standard for constructive discharge and concluded that substantial evidence did not exist to support the jury verdict. The petitioner's representation that the Fourth Circuit applied some aberrant standard is simply not true. Ms. Gill is merely asking this Court to review the record and make factual determinations. This is a garden variety constructive discharge claim, the standard for which is not in dispute among the Circuits. This case does not warrant the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, System Planning Corporation urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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